

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

SMASH TECHNOLOGY, a Nevada)
limited liability company,)
et al.,)

Plaintiffs,)

vs.)

Case No: 2:19cv00105

SMASH SOLUTIONS, a)
Delaware limited liability)
company, et al.,)

Defendants,)

BEFORE THE HONORABLE TENA CAMPBELL

August 14, 2019

MOTION HEARING

Reported by:
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1 SALT LAKE CITY, UTAH, WEDNESDAY, AUGUST 14, 2019

2 * * * * *

3 THE COURT: Okay. We're here in Smash Technology
4 and others vs. Smash Solutions here today on various motions.

10:03:44 5 Representing the plaintiff is Mr. Reid.

6 MR. REID: Yes, Your Honor.

7 THE COURT: And Mr. Maxfield.

8 MR. MAXFIELD: Yes, Your Honor.

9 THE COURT: And behind we have Ms. Larsen.

10:03:56 10 MS. LARSEN: Yes.

11 MR. REID: Yes, Your Honor. And I'd also like to
12 introduce my cousin Asia Reid. She's a high school senior
13 interested in practicing law.

14 THE COURT: Thank you. Nice to meet you. After
10:04:07 15 you've watched a little bit, you might decide to go into an
16 honest profession.

17 And for the defense we have Mr. Barneck.

18 MR. BARNECK: Yes.

19 THE COURT: And Ms. Ruedas.

10:04:18 20 MS. RUEDAS: Yes, Your Honor.

21 THE COURT: Okay. Let's take care of what I
22 believe to be, and I've read your materials quite carefully,
23 lots of them though there be, voluminous though they are.
24 Let's look at the motion to amend filed by the plaintiff, that
10:04:41 25 is granted without argument. I know there was an opposition,

1 and I read it very carefully. But considering all the
2 pleadings and the stage where we are in the litigation I am
3 going to grant it.

4 Next let's move to the motion for partial summary
10:05:06 5 judgment filed by the defense, and the issue being that
6 Solutions owns all rights to the technology. Have I
7 characterized that correctly?

8 MR. BARNECK: I believe that's correct, Your Honor.

9 THE COURT: All right. The first question I'm
10:05:38 10 going to ask you as I will the plaintiffs is to define the
11 technology for me that we are discussing ownership of. Are we
12 discussing the, quote, infant technology or the now developed
13 marketable technology that you are saying you own it all and
14 Technology has no right? Okay?

10:06:12 15 MR. BARNECK: That is correct, Your Honor. I guess
16 I don't agree with the distinctions that the plaintiffs try to
17 make between infant and developed, but we believe the
18 technology includes the intellectual property, the underlying
19 idea and the software that has been developed based upon it.

10:06:34 20 THE COURT: The marketable software.

21 MR. BARNECK: And even software that's not yet in a
22 marketable stage, if that is the case. My understanding is
23 it's still in the final stages of development.

24 THE COURT: By FeraCode.

10:06:48 25 MR. BARNECK: FeraCode is doing some of the coding

1 work, but I think I would characterize Solutions as the one
2 who is the developer.

3 THE COURT: And so it is, you just say that
4 there's -- and correct me because I'm just kind of finding my
10:07:08 5 way along here. When the partnership that didn't go anywhere
6 began, you were talking about what is called infant
7 technology?

8 MR. BARNECK: That's not my term. That's a term
9 the plaintiffs have used.

10:07:25 10 THE COURT: And what do you understand that to
11 mean?

12 MR. BARNECK: I'm not sure what that means. I
13 think what the plaintiffs are trying to say is it wasn't very
14 much before they got involved and now it's more.

10:07:36 15 THE COURT: But you would agree that it wasn't very
16 much and now it's more, because there has been work by
17 FeraCode and by you; right? And when say "you" I mean
18 Solutions.

19 MR. BARNECK: Solutions, yes.

10:07:52 20 THE COURT: Am I right?

21 MR. BARNECK: That is true. Both FeraCode and
22 Solutions have continued to do work. We think the idea was
23 fully developed beforehand.

24 THE COURT: And "beforehand," what do you mean?

10:08:05 25 MR. BARNECK: Before discussions with the

1 plaintiffs about some kind of joint business venture.

2 THE COURT: All right.

3 MR. BARNECK: And what hadn't been developed is the
4 translating of that idea into a final piece of marketable
10:08:19 5 software.

6 THE COURT: Right. So that's what as you
7 understand the term to be used by the plaintiffs, that initial
8 is what they call the infant technology.

9 MR. BARNECK: I assume that's what they mean by it.
10:08:36 10 Again, I don't -- I think that casts it in the wrong light, so
11 I'm not inclined to sign onto that label.

12 THE COURT: Right. But now we're talking about
13 CRM Platform that has been developed, and to whatever extent
14 you say it's not quite ready, but it is -- it has changed
10:09:06 15 whether it's changed from the basic principle. But it is
16 different, although you say it's really the same animal as
17 began with your idea.

18 MR. BARNECK: I think that's correct. And our
19 position is that Solutions has owned it all along regardless
10:09:29 20 of whether it's characterized as infant technology or more
21 developed technology.

22 THE COURT: And what you are seeking with this
23 motion and also I think under the whole lawsuit, if I'm not
24 mistaken, you want a declaration that Solutions and Solutions
10:09:53 25 only possesses all the rights, the interests and the ownership

1 of that platform; am I correct?

2 MR. BARNECK: That is correct, yes.

3 THE COURT: Okay. And, of course, and you'll deal
4 with it, plaintiff is saying not so fast. Look at all the
10:10:13 5 money that we've poured in.

6 MR. BARNECK: That is what they're saying.

7 THE COURT: Okay. So at least I have the outlines
8 of what we'll be talking about. So you go ahead, please.

9 MR. BARNECK: Okay. Thank you, Your Honor. I
10:10:26 10 think that's helpful. You are correct that our motion as we
11 see it is rather narrow. It seeks a ruling that Solutions
12 owns the intellectual property, both the idea and the software
13 that has been developed based upon that idea, and the
14 ownership of that intellectual property has never been
10:10:49 15 transferred.

16 THE COURT: Would you say there was or was not an
17 agreement to transfer it?

18 MR. BARNECK: There was no written agreement.
19 There were discussions. I guess I hesitate to say whether
10:11:05 20 those discussions would meet the terms of an agreement under
21 contract law because we actually have some concerns about the
22 way plaintiffs characterize that agreement, that it isn't
23 enforceable. But there were certainly discussions toward an
24 agreement and the intent to ultimately form a joint business
10:11:26 25 venture. And for the reasons we've said that failed and other

1 reasons probably that we haven't even addressed.

2 Procedurally, and I think there is an important
3 procedural element to this --

4 THE COURT: Okay.

10:11:42 5 MR. BARNECK: -- we have a properly supported
6 motion for summary judgment under 56(c). We have cited
7 documentary evidence and included declarations to support our
8 positions. And I think the question is whether --

9 THE COURT: What's your main documentary evidence
10:12:03 10 would you say?

11 MR. BARNECK: Well, I think the primary evidence
12 is --

13 THE COURT: Is it lack of evidence on their part?

14 MR. BARNECK: I think that's the most important
10:12:20 15 point. We do have documentary evidence, but that includes the
16 operating agreement for plaintiff's Smash Technology which,
17 you know, indicates it's a solely owned, one member, single
18 member entity, not a joint ownership entity as they allege it
19 was supposed to be. We primarily have our declaration from
10:12:42 20 our client Jerry Ulrich, who was a manager of Solutions, who
21 says Solutions has always owned this intellectual property and
22 there's never been a transfer. There is no document anywhere
23 that assigns rights, either limited rights or complete
24 ownership interest in the intellectual property.

10:13:07 25 THE COURT: Could you give me that document number,

1 please? I've got a lot of paper here.

2 MR. BARNECK: The declaration is document
3 Number 33.

4 THE COURT: Okay.

10:13:24 5 MR. BARNECK: And he goes into some detail about
6 when this development began in 2012 and so on.

7 THE COURT: Let me just find it.

8 MR. BARNECK: Sure.

9 THE COURT: That's okay. Thank you. Go ahead,
10:14:01 10 please.

11 MR. BARNECK: So Mr. Ulrich's declaration states
12 that the software really is a data collection platform that
13 has --

14 THE COURT: Excuse me.

10:14:20 15 (Discussion off the record.)

16 THE COURT: Okay. Thank you.

17 MR. BARNECK: You've got it?

18 THE COURT: Yes, I do.

19 MR. BARNECK: Okay. So he explains the software as
10:14:34 20 a data collection platform, I'm look at Paragraph 6 --

21 THE COURT: Yep.

22 MR. BARNECK: -- that has CRM capabilities,
23 customer relationship management. He wouldn't characterize it
24 as primarily a CRM type of software. There's lots of CRM
10:14:53 25 software out there. And Solutions owns it and has owned it.

1 Solutions began developing it in 2012, long before
2 Mr. Alexander or Splash Technology ever entered the scene.
3 And the bill plan is something he put together, Solutions,
4 did, of 6,000 pages. And it was provided to Farracode, and
10:15:19 5 FeraCode has been doing coding work.

6 THE COURT: Let me ask you. When you say, looking
7 at Paragraph 11, you say: This agreement has never been
8 canceled and remains in force.

9 What agreement are you speaking of?

10:15:41 10 MR. BARNECK: I'm speaking of the agreement between
11 Solutions and FeraCode. And, I'm sorry, there's -- that may
12 just be out of order or there's something missing there. But
13 FeraCode and Solutions signed a contract in January of 2018,
14 and it's that contract that the declaration is referring to.
10:16:10 15 It's never been canceled.

16 THE COURT: Okay. So this is -- this agreement is
17 the FeraCode. But as I understand it and do you understand
18 the assertion there's also an agreement between either
19 Mr. Alexander and FeraCode or Technology and FeraCode?

10:16:31 20 MR. BARNECK: Technology and FeraCode. There is --

21 THE COURT: So there are two agreements with
22 FeraCode. Do they both center on the same intellectual
23 property? The same software?

24 MR. BARNECK: It's my understanding that that was
10:16:50 25 the intent.

1 THE COURT: So you have one -- what is FeraCode?
2 Kind of a coding business?

3 MR. BARNECK: That's my understanding, yeah. They
4 write the code. And I'm sounding like a computer scientist
10:17:03 5 and I'm not. But they write the code, as I understand, that
6 makes the software function and implement the idea.

7 THE COURT: So you have one software or whatever
8 and one company writing the code to implement this software.
9 I presume FeraCode will undertake the same efforts. But two
10:17:42 10 agreements.

11 MR. BARNECK: Well, it's important to remember that
12 the second one, that FeraCode canceled the second one.

13 THE COURT: Right.

14 MR. BARNECK: So in our view, the second one no
10:17:50 15 longer exists.

16 THE COURT: In your view why did FeraCode cancel
17 it?

18 MR. BARNECK: Well, what it says, and that's the
19 only view I have, the notice of termination says for serious
10:18:03 20 delinquency in payments --

21 THE COURT: Right.

22 MR. BARNECK: -- and because of the failure of the
23 transfer of the intellectual property to technology.

24 THE COURT: And that was how long after the
10:18:19 25 FeraCode technology agreement was signed?

1 MR. BARNECK: I think about 10 months.

2 THE COURT: 10 months.

3 MR. BARNECK: So March of '18 to January of '19.

4 THE COURT: And your agreement or Solutions'

10:18:36 5 agreement is still ongoing.

6 MR. BARNECK: Still ongoing.

7 THE COURT: Okay. Go ahead, please.

8 MR. BARNECK: And so Mr. Ulrich declares in his

9 declaration that ownership or any other interests in the

10:18:58 10 intellectual property have never been transferred to

11 Technology. And we agree that there were discussions toward

12 that as an ultimate end. It just never happened. Things fell

13 apart. There are going to be different versions on both

14 sides, but we've laid out some of the reasons why it didn't

10:19:18 15 happen. Mr. Ulrich, his position is as he's -- as we've said

16 in the filings that Mr. Alexander did not fund the coding

17 work, the development of the software in the way it was needed

18 and the way he agreed to.

19 THE COURT: But was there some funding by

10:19:42 20 Mr. Alexander?

21 MR. BARNECK: There was some funding, yes. There

22 is a wide disparity. Our records show \$132,000. His

23 declaration says it was over 2 million, and we don't have

24 documentation to back that up.

10:20:00 25 THE COURT: So there's a big -- there's a disputed

1 fact about how much Mr. Alexander put toward the development.

2 MR. BARNECK: There is; although I would add
3 quickly that we don't believe that has anything to do with the
4 ownership.

10:20:21 5 THE COURT: Okay. Well, why would that be?

6 MR. BARNECK: Well, because the agreement was
7 for --

8 THE COURT: Okay. Now when you say "agreement,"
9 which agreement?

10:20:32 10 MR. BARNECK: Sorry. The agreement that plaintiffs
11 allege, an unwritten verbal agreement toward this joint
12 business venture. What they say is Mr. Alexander was to fund
13 Technology, his own company, and there simply was never any
14 transfer of ownership. It didn't happen.

10:20:52 15 Now, I'm probably getting a little bit ahead of
16 myself.

17 THE COURT: Okay. Go back to where you're
18 comfortable.

19 MR. BARNECK: So what I want to start from is the
10:21:06 20 procedural posture that I believe we have a properly supported
21 motion for summary judgment under Rule 56(c) with evidence to
22 support the position not just relying upon the allegations of
23 pleadings.

24 THE COURT: And your main evidence, correct me if
10:21:23 25 I'm wrong, is document Number 33, Mr. Ulrich's affidavit;

1 correct?

2 MR. BARNECK: I think that is an important part of
3 it.

10:21:35

4 THE COURT: What else did you think supports your
5 position?

6 MR. BARNECK: I believe that the two FeraCode
7 agreements and the cancellation of the second one.

8 THE COURT: So the cancellation by FeraCode of the
9 agreement with --

10:22:13

10 MR. BARNECK: With Technology.

11 THE COURT: -- with Technology.

12 MR. BARNECK: And the stated reasons for it.

13 THE COURT: Yeah. Which said you never got it.

14 And then the still existing agreement I guess between

10:22:29

15 Solutions and FeraCode; right?

16 MR. BARNECK: Yes. Yes.

17 THE COURT: Okay.

18 MR. BARNECK: That's correct. Also I believe an
19 important part of the record is, and I think it's attached to

10:22:45

20 our reply, but is the operating agreement for Smash
21 Technology, LLC, which indicates, it's in the pleadings on the
22 plaintiff's side, but it's a single member LLC.

23 THE COURT: Okay. It's attached -- tell me that
24 again. It's the --

10:23:11

25 MR. BARNECK: So the verbal agreement that the

1 plaintiffs allege included the formation of an entity, and I
2 think they say that Ulrich and Alexander discussed ultimately
3 becoming joint owners of that entity. That joint ownership
4 never did happen. Smash Technology, LLC, was formed in
10:23:43 5 February of 2018, so the last day of February. It's a single
6 member LLC, and even by the most recent, the now approved
7 amended complaint, the plaintiffs still say that Mr. Alexander
8 is the sole member of Technology.

9 THE COURT: Make sure that I've got -- I'm seeing
10:24:06 10 Document 46-1, maybe I'm wrong, an LLC.

11 MR. BARNECK: That's it.

12 THE COURT: And you're saying that it supports your
13 position why?

14 MR. BARNECK: Because it's solely owned by
10:24:25 15 Mr. Alexander. It's not as directly supportive of who owns
16 it. But the agreement, the verbal agreement that the
17 plaintiffs allege supposedly required the transfer of the
18 intellectual property to Technology and that Ulrich and
19 Alexander would be joint owners of that entity. Well, we say
10:24:56 20 the intellectual property was never transferred, and there's
21 no document anywhere that says it was. And moreover, the
22 entity that was supposed to then become the owner is solely
23 owned by Mr. Alexander. So why would Solutions --

24 THE COURT: Wait. I'm getting mixed up. As I'm
10:25:18 25 looking at the signature page, Smash Solutions, LLC.

1 MR. BARNECK: Okay.

2 THE COURT: And I see it signed by Mr. Ulrich.

3 MR. BARNECK: No. You're right. I'm sorry.

4 That's the Smash Solutions operating agreement.

10:25:36 5 THE COURT: And it's owned -- the manager and CEO
6 is designated as Mr. Ulrich.

7 MR. BARNECK: Yes. I apologize for that confusion.

8 THE COURT: That's okay.

9 MR. BARNECK: Our reply memorandum does refer to
10:25:50 10 the Technology operating agreement, and I believe it is filed,
11 but I assume that it was that one. I didn't look close
12 enough, and I apologize.

13 THE COURT: So do you think in the record there's
14 somewhere --

10:26:05 15 MR. BARNECK: Yes.

16 THE COURT: -- a document that is an operating
17 agreement of what entity signed by whom?

18 MR. BARNECK: Smash Technology, LLC, signed by
19 Michael Alexander. And it is document Number 32-4. I've just
10:26:24 20 found the citation to it.

21 THE COURT: Okay. Let's see if we've got it. I
22 have 32-4.

23 MR. BARNECK: So it's actually attached to our
24 motion as opposed to our reply memorandum. That's where my
10:26:45 25 confusion came from.

1 THE COURT: The operating agreement of Smash
2 Technology, and then it is dated whatever and signed by
3 Mr. Alexander. And you say that it shows what, sir?

4 MR. BARNECK: What it shows is that only
10:27:08 5 Mr. Alexander is the owner of that entity.

6 THE COURT: Smash Technology.

7 MR. BARNECK: Yes.

8 THE COURT: And because Mr. Alexander represents
9 himself in this document as the sole owner how does that
10:27:26 10 support your argument?

11 MR. BARNECK: It's secondary support. And it's
12 support because it is contrary to the verbal agreement that
13 the plaintiffs say was reached between Mr. Ulrich and
14 Mr. Alexander, that the two would jointly own an entity that
10:27:44 15 would own the software. And this is not a jointly owned
16 entity.

17 THE COURT: Okay. I see what you're saying.

18 MR. BARNECK: Yes.

19 THE COURT: That makes it clear. Thank you.

10:27:53 20 MR. BARNECK: You bet. And so what we think the
21 Court should consider is, has the plaintiffs presented any
22 admissible evidence that would demonstrate a genuine issue of
23 fact as required under Rule 56?

24 THE COURT: A genuine issue of fact --

10:28:15 25 MR. BARNECK: As to the ownership.

1 THE COURT: -- of the software.

2 MR. BARNECK: Yes. The intellectual property and
3 the software that it's based on. And in our view is they
4 haven't done it, and I'll mention a few reasons why.

10:28:30 5 THE COURT: Okay.

6 MR. BARNECK: One important reason is that there is
7 no writing transferring any ownership rights, whether the
8 trademark only or the entire bundle of rights that full
9 ownership would include.

10:28:46 10 THE COURT: Would you say that under the law such
11 is required?

12 MR. BARNECK: Yes.

13 THE COURT: Okay.

14 MR. BARNECK: And let me add to that.

10:28:53 15 THE COURT: Tell me why. Is it because it's
16 copyright or something or what?

17 MR. BARNECK: There's a registered trademark.

18 THE COURT: Okay. A registered trademark.

19 MR. BARNECK: And I have a copy of that I can hand
10:29:07 20 to the Court, and I think I would like to file something to
21 supplement the record to include it. But this is a record of
22 the trademark registration in the name of Splash Solutions,
23 LLC, from 2014.

24 THE COURT: And what is it registered?

10:29:26 25 MR. BARNECK: Well, it's the name Smash Solutions,

1 LLC, and then there's a mark which is not shown on this
2 registration, but it's part of the symbol.

3 THE COURT: Okay.

4 MR. BARNECK: And then the goods and services that
10:29:41 5 go along with the word mark include software program.

6 THE COURT: So you believe that under the trademark
7 law any agreement about a joint transfer of the software would
8 have to be in writing.

9 MR. BARNECK: Yes. In fact, there's a statute
10:30:07 10 entitled 15 that we've cited in our brief. It's Title 15
11 Section 1060 that says: Assignments shall be by instruments
12 in writing duly executed.

13 THE COURT: And it would be the assignment of the
14 software.

10:30:25 15 MR. BARNECK: Of a trademark.

16 THE COURT: Of a trademark.

17 MR. BARNECK: Yes.

18 THE COURT: And the trademark would be Smash
19 Solutions.

10:30:33 20 MR. BARNECK: Yes.

21 THE COURT: Okay.

22 MR. BARNECK: So there is also some case law that
23 we've cite --

24 THE COURT: But I thought that the alleged
10:30:45 25 agreement was Smash Solutions would vanish, be dissolved, and

1 then another entity or whatever would continue in the
2 development. Is that not so?

3 MR. BARNECK: The intent of these discussions
4 toward a joint venture together was that ultimately Splash
10:31:18 5 Solutions would be dissolved after a new joint entity was
6 formed and the intellectual property was transferred to it.
7 So that was the intent.

8 THE COURT: So why would there have to be a
9 transfer of Smash Solutions to somebody or something else if
10:31:36 10 it's going to be dissolved?

11 MR. BARNECK: Not of the entity itself, but of the
12 trademark --

13 THE COURT: Of Smash Solutions.

14 MR. BARNECK: -- in the name of Smash Solutions.

10:31:48 15 THE COURT: Why would the trademark have to be
16 transferred if the development, marketing, et cetera, would be
17 done by a new entity? Why would that trademark have to be
18 transferred?

19 MR. BARNECK: Let me back up a half step. There
10:32:02 20 wouldn't have to be a transfer of solely the trademark, but if
21 the entire ownership, the entire bundle of rights of ownership
22 which would include the trademark right were transferred, then
23 the new entity would own it; right? But this statute says
24 that there has to be a written assignment duly executed. And,
10:32:25 25 in fact, the statute directs the USPTO to maintain a record of

1 information on assignments. So the writing requirement is
2 pretty strict.

3 THE COURT: Okay.

4 MR. BARNECK: And there is some case law that we
10:32:42 5 cited which we think is important for the Court from the
6 Second Circuit, a case titled SPI Spirits. It was litigation
7 over the trademark for a brand of Russian vodka. And the case
8 talks about this statute and the writing requirement and says
9 some important things here. It says, you know, this may seem
10:33:15 10 like that it's unduly technical or overly formal. I'll quote
11 it: Although it may seem formalistic the writing requirement
12 is written in policy concerns.

13 And those policy concerns, some of them at least
14 fit our case very well, to ensure that the owner of
10:33:40 15 intellectual property does not assign it inadvertently and to
16 enhance the predictability and certainty of ownership.

17 THE COURT: Right.

18 MR. BARNECK: Which goes directly to our issue.
19 And then the Court goes on to say: A clear writing affecting
10:33:56 20 an assignment signals to the parties and the world that the
21 assigned is the party that owns the mark and is authorized to
22 exclude others from use.

23 So the state of the law requires a written
24 instrument duly executed to transfer a registered trademark.
10:34:18 25 That does not exist here. And we've asserted that none

1 exists. The plaintiffs have not produced one, neither in
2 discovery behind the debriefing or outside of the briefing.
3 They certainly haven't attached one to it. And neither does
4 the declaration say that there is one.

10:34:40 5 There's a part of the record that we've cited that
6 we think is rather telling, and that was in an e-mail exchange
7 between Mr. Alexander and Mr. Ulrich from December of 2018,
8 just one month before the plaintiffs filed this suit,
9 Mr. Alexander saying that the lawyer he had been working with
10:35:01 10 in Las Vegas, Sterling Kerr, has the agreement and needs more
11 information from you to finalize it.

12 We think that's a pretty significant admission that
13 it was not finalized then, and it never has been finalized
14 since. So that's a significant hurdle for the plaintiffs that
10:35:21 15 frankly we think they can't get over. There is no -- there
16 just is no right that satisfies the writing requirement.

17 Now, let me address some of the other arguments
18 they do make because they do talk about funding a lot, as Your
19 Honor has referenced. We are not asking the Court to resolve
10:35:45 20 that issue about how much Mr. Alexander provided by the way of
21 funding and what he is entitled to in exchange for that
22 funding. It may be that he's entitled to an ownership
23 interest in Solutions, Smash Solutions, LLC. It may be that
24 he is entitled to -- that his claim for unjust enrichment will
10:36:06 25 succeed or it may be that his breach of contract claim will

1 succeed, and he's entitled to damages. We don't concede any
2 of that, we're just saying those are issues for another day.
3 And the declarations about payments having been made are
4 separate and unrelated to the question of whether ownership of
10:36:28 5 this intellectual property was ever transferred.

6 So those -- that is really -- as I understand the
7 plaintiff's position, they make two arguments over and over,
8 and that's one, we gave a lot of money in funding; and, two,
9 that the parties talked about forming a partnership or some
10:36:50 10 kind of joint business venture. And we agree they talked
11 about it. But the facts show that it just never materialized
12 for reasons that will probably be disputed. But that again is
13 a separate question from whether the ownership of the
14 intellectual property was transferred.

10:37:10 15 Now, let me address this from a different
16 standpoint. Going back to I think the procedural framework
17 that is before the Court, the plaintiffs bear the burden of
18 proof on these facts, these legal claims, the claims of
19 ownership. They are the plaintiffs. They have alleged claims
10:37:38 20 under the Lanham Act, three claims under the Lanham Act:
21 false advertising, false designation of origin and unfair
22 competition. All of those are based upon 15 USC Section 1125.
23 We cited case law to the Court which shows that to pursue any
24 one of those claims you have to be the owner of the mark or
10:38:06 25 have the right to use it under a license of some kind.

1 THE COURT: Right.

2 MR. BARNECK: The plaintiffs do not respond at all
3 to the case law we were talking about a minute ago, the
4 statute that requires the writing and the Second Circuit case
10:38:22 5 about Russian vodka. They don't even acknowledge that it
6 exists much less dispute that it applies. I think this other
7 case law that I'm just referring to now that requires
8 ownership of at least the mark if not ownership of the
9 technology as a whole, that I think was included in our reply
10:38:45 10 memorandum. But they still in their opposition have not
11 challenged the notion that it's their burden of proof.

12 And so we think it fails because -- the plaintiff's
13 position fails that is, because they simply cannot show a
14 genuine issue of fact as to ownership, and it is their burden
10:39:07 15 to prove. It's not our burden ultimately, it's theirs. And
16 so as I understand the shifting responsibilities under
17 Rule 56, if we file a properly supported motion and the other
18 side has the burden of proof at the end of the day, they carry
19 the burden to come forward with facts that present a genuine
10:39:33 20 dispute for the court. And that we believe they have not done
21 and on the record simply cannot do. Let me see if there is --

22 I guess another aspect of this that I want to
23 address here, we've addressed it quite a bit in our briefing,
24 and that is that we believe that much of what the plaintiff
10:40:03 25 relies upon in terms of record response. Mr. Alexander's

1 declaration is quite lengthy, and several documents were
2 attached to their opposition.

3 THE COURT: Oh, yes.

4 MR. BARNECK: Much of it is not admissible
10:40:20 5 evidence. Mr. Alexander's statements are conclusory in form.
6 He says --

7 THE COURT: But aren't yours? Aren't Mr. Ulrich's
8 somewhat conclusory?

9 MR. BARNECK: I suppose any declaration of
10:40:37 10 ownership ultimately is a conclusion.

11 THE COURT: Right.

12 MR. BARNECK: But I believe Mr. Ulrich has got some
13 background facts to support that conclusion, whereas
14 Mr. Alexander's, his declaration and the opposition continues
10:40:54 15 to say it's a mantra, rather, that says over and over that
16 they own rights, interests, and ownership in and/or control.
17 Very conclusory terms. They don't say, here's the date on
18 when it was transferred. Here's what's happened. Here's the
19 document that effected that transfer. Here's exactly what
10:41:19 20 Mr. Ulrich said to me. I just transferred it. There's
21 nothing like that. The closest that it comes is a reference
22 in the declaration that says --

23 THE COURT: Where are you?

24 MR. BARNECK: I'll tell you exactly where that is.
10:41:33 25 So this is document Number 38-1.

1 THE COURT: Right. What paragraph?

2 MR. BARNECK: Paragraph 7. I think this is the
3 closest the plaintiffs come, and it still isn't enough.

10:41:54

4 THE COURT: Here we go. I understood that Ulrich
5 transferred Solutions infant intellectual property to
6 Technology and dissolved Solutions.

10:42:12

7 MR. BARNECK: Yes. Based upon his representations.
8 We don't know what those representations were, when they were
9 said, what exactly was said, what was the context. But he's
10 making an assumption based upon some undefined, undisclosed
11 representations that there was a transfer.

10:42:43

12 THE COURT: Well, couldn't it be read that the
13 representations that Mr. Alexander is talking about really are
14 found in Paragraphs 5 and 6 right above 7? Could those be the
15 representations? I understood that Ulrich transferred
16 Solutions' infant intellectual property to Technology and
17 dissolved Solutions. And 5 he says, Ulrich agreed to dissolve
18 Solutions, and then talks about money a little bit.

10:43:06

19 MR. BARNECK: I suppose that's right. I mean, if
20 you and I have to guess at what this is, then it's pretty
21 shaky. But even if we say okay, 5 and 6 are the
22 representations that he's talking about --

23 THE COURT: Right.

10:43:23

24 MR. BARNECK: -- then my question is, is that a
25 material fact given the law that requires a written instrument

1 duly executed to effect the transfer?

2 THE COURT: Of the trademark.

3 MR. BARNECK: Or the entire bundle of ownership
4 rights.

10:43:39 5 THE COURT: See, I'm getting all confused. The
6 ownership of -- the transfer of ownership rights, because if
7 Solutions was going to be dissolved then all that would be
8 transferred would be the software; right? And do you think
9 that the statute Section 1060 requires a writing to transfer
10:44:13 10 the ownership of just the software if the name Smash Solutions
11 wasn't going to be part of the bundle?

12 MR. BARNECK: I don't think Section 1060 requires a
13 writing to transfer the entire thing. But think of it this
14 way --

10:44:30 15 THE COURT: Okay.

16 MR. BARNECK: -- if you transfer the entire
17 ownership, the entire bundle of rights relating to that
18 software including the name, then that would include a
19 trademark right. And the trademark right itself does have to
10:44:43 20 be transferred by a written instrument.

21 THE COURT: Sure. But, okay. And this is
22 something I'll clear up with or try to clear up with
23 plaintiff. And then, of course, you'll have an opportunity to
24 tell me what I need to know. I really need to know what the
10:45:03 25 agreement was, unwritten as it was, about what was going to

1 happen to the trademark Smash Solutions. Okay?

2 MR. BARNECK: I can he tell you what they allege.

3 THE COURT: Okay.

4 MR. BARNECK: If you'd like. I have their -- they

10:45:20 5 allege --

6 THE COURT: From the complaint?

7 MR. BARNECK: Yes.

8 THE COURT: Oh, I've got that, too.

9 MR. BARNECK: Okay. So, I mean, they say there's

10:45:28 10 four terms to it. But back to this point because I'm afraid
11 it's a little bit confusing. I think the statute, the writing
12 requirement of the statute only applies to the trademark right
13 and to a registered trademark right, which this one is
14 registered. By the way, I still have that. I'm happy to hand
10:45:52 15 it to the Court.

16 THE COURT: I agree. I accept that.

17 MR. BARNECK: I don't think the writing requirement
18 is strict when it's applied to the entire bundle of rights
19 that full ownership would transfer. But that bundle of rights
10:46:11 20 includes the trademark. So if you're only going to transfer
21 the entire ownership of intellectual property not separate
22 from the trademark, then you still have to have a writing at
23 least for it.

24 THE COURT: What if it is separate from the
10:46:26 25 trademark?

1 MR. BARNECK: If it is separate? Then I don't
2 think the writing requirement is as strict.

3 THE COURT: Right.

10:46:37

4 MR. BARNECK: But we filed some other authority
5 yesterday to say it is still strongly encouraged.

6 THE COURT: Sure. Sure.

10:46:51

7 MR. BARNECK: And I think the standard is there has
8 to be strong evidence. That's the Seventh Circuit standard
9 that is the leading case on it. In our situation that's a
10 nonissue because as I understand it the alleged agreement was
11 to transfer the entire ownership of intellectual property in
12 the software, which would include the trademark right.

13 THE COURT: Okay.

10:47:04

14 MR. BARNECK: And therefore the writing requirement
15 applies.

16 THE COURT: All right.

17 MR. BARNECK: Okay.

18 THE COURT: What else should I be thinking about,
19 sir?

10:47:10

20 MR. BARNECK: I think those are the main points.
21 And if I have a little chance for a rebuttal I'll see anything
22 else.

23 THE COURT: You'll have a chance for rebuttal for
24 sure.

10:47:20

25 MR. BARNECK: Okay. Thank you very much.

1 THE COURT: Okay. Tell me, sir, my first question,
2 Mr. Maxfield --

3 MR. REID: Mr. Reid.

4 THE COURT: Mr. Reid.

10:47:33 5 MR. REID: You're good, Your Honor.

6 THE COURT: You are Mr. Maxfield; you're Mr. Reid.
7 Tell me, Mr. Reid, what was the agreement?

8 MR. REID: Your Honor, the agreement had several
9 components to it.

10:47:43 10 THE COURT: Do you outline it in your complaint?

11 MR. REID: I do. And then, of course, the
12 agreement is then supported by the documentary evidence that
13 we put into the record, as well.

14 THE COURT: Tell me first what the agreement is and
10:47:57 15 what the documentary -- well, the documentary evidence,
16 doesn't that mainly have to do, and correct me if I'm wrong,
17 with the discussions by e-mail or whatever between
18 Mr. Alexander and Mr. Ulrich about paying money?

19 MR. REID: Yes; among other things. I think what
10:48:22 20 will be helpful for the Court --

21 THE COURT: I need some help.

22 MR. REID: -- is we've had some allegations that
23 are deliberately confusing, and they're intended to obfuscate
24 the facts before the Court. The defendants' entire summary
10:48:39 25 judgment is based on one statement in a declaration by Jerry

1 Ulrich, the defendant. And he says that Smash Solutions owns
2 the software, the intellectual property at issue in this case.

3 THE COURT: And he -- but how does it tie in or is
4 that the same his assertion that Smash Solutions never
10:49:05 5 transferred anything to do with that software?

6 MR. REID: Right. We have a disputed fact on that
7 issue, and here's why.

8 THE COURT: Okay.

9 MR. REID: In response to that statement, we have a
10:49:18 10 counter declaration from Mr. Alexander saying, no, actually my
11 company Smash Technology --

12 THE COURT: Right.

13 MR. REID: -- owns that CRM Platform, that
14 developed software technology. And then in support of that we
10:49:38 15 have submitted numerous documents that demonstrate the
16 transfer indeed did happen and that Mr. Alexander's statement
17 does have merit, especially at the summary judgment stage.

18 THE COURT: Okay. So if you can help me break that
19 down, and it is quite a lengthy little affidavit.

10:50:04 20 MR. REID: What I would like to do is I would like
21 to put in front of the Court a few of the key documents.

22 THE COURT: Please do. Are they in the record?

23 MR. REID: They are in the record. They're part of
24 our appendix of evidence, and I will put them on the monitor
10:50:16 25 in front of the Court. But before I do that, let me just say

1 something that's critical. This is not a trademark
2 infringement case. The word "trademark" or "infringement" do
3 not appear in our complaint or our first amended complaint,
4 which the Court has just granted leave to file.

10:50:37 5 THE COURT: I don't think there's an allegation so
6 much in the argument, if I'm understanding the defense's
7 argument. What it is is that if you transfer a trademark
8 which according to the defense was contemplated, the trademark
9 being Smash Solutions, then according to the trademark statute
10:51:06 10 there has to be a right.

11 MR. REID: Right. And this case has nothing to do
12 with the transfer of a trademark. We don't care about it. We
13 don't care if it was transferred. And, in fact, as the Court
14 already identified, we have a new company with a different
10:51:21 15 name. We have no interest in a trademark, and that's why it's
16 not an issue in this case.

17 THE COURT: And a new company is what, Technology?

18 MR. REID: Smash Technology. Yes. So Technology
19 received its rights in the ownership of software. Here's a
10:51:42 20 way to think about it, Your Honor.

21 THE COURT: Okay. Please, I need help.

22 MR. REID: Microsoft has software, Microsoft Word.
23 Over here it has trademarks, symbols that it uses and other
24 things to help advertise and sell its good. They're two
10:52:01 25 vastly different assets.

1 This case is only about the software. It has
2 nothing to do with trademarks or the way that you advertise
3 the name of a company, a brand, et cetera. So what is --
4 candidly I'm flabbergasted that counsel in their reply raised
10:52:26 5 all of these procedurally improper arguments related to
6 trademarks. It's deliberately confusing. The cases are not
7 on point. And, in fact, what they say is they cite the
8 Lanham Act and say that the Lanham Act has this requirement
9 that assignments of registered trademarks shall be by
10:52:53 10 instruments in writing duly executed.

11 But this case isn't about trademarks. And, in
12 fact, the Lanham Act covers a whole range of goods or services
13 that are protected from unfair competition and false
14 advertising. That's why we raised those Lanham Act claims,
10:53:15 15 because what we're saying is, hey, bad guys, you're telling
16 the word -- the world that you own our software. You don't.
17 And here's why they don't. Because the agreement between my
18 client Mr. Alexander and their client Mr. Ulrich actually did
19 materialize. And the parties went considerably down the road
10:53:45 20 of performing their partnership in the new Smash Technology
21 company.

22 THE COURT: How about the fact, and now I'm getting
23 mixed up, about the document that the operating agreement
24 which Mr. Barneck gave me the number to is for Technology is
10:54:13 25 just signed by Mr. Alexander and there's absolutely nothing to

1 do with Mr. Ulrich?

2 MR. REID: That's one document among many. That's
3 one piece of evidence among many that the Court as the
4 factfinder at a trial will have to determine its weight. But
10:54:34 5 for purposes of summary judgment, and counsel said that at the
6 Rule 56 stage we have to prove ownership. We have the burden
7 of proving ownership. Well, that's completely false.

8 THE COURT: Well, I don't know that it's false.

9 MR. REID: It is false, Your Honor. All we have to
10:54:51 10 do is demonstrate that there's a disputed issue of fact, a
11 genuine material fact relating to ownership. And we've done
12 that in spades.

13 THE COURT: Okay. Calm down just a second. What
14 you have to do is, the defense to establish its point that it
10:55:13 15 never transferred anything to either Mr. Alexander or to
16 Technology has pointed to documents. Among them one of the
17 things they point to is, and then it's up to you to rebut it,
18 it's up to you to put up enough to show that they -- that
19 there's a fact that defeats summary judgment.

10:55:45 20 MR. REID: Right.

21 THE COURT: And what the defense is arguing is,
22 hey, your arguments show only the transfer of money. And you
23 were speaking with Mr. Ulrich about a partnership, but it
24 never came to be. You got zip. In fact, FeraCode canceled.
10:56:13 25 We were the ones who paid FeraCode in our initial idea to

1 where it is now belongs to us only because we didn't transfer
2 it.

3 MR. REID: Your Honor, what I'm telling you is we
4 met our burden and our obligation by putting forward not only
10:56:31 5 Mr. Alexander's declaration, but the voluminous documents that
6 specifically detail the transactions that occurred. And let
7 me put the first one in front of you.

8 THE COURT: Please do. That will help.

9 MR. REID: Exhibit A, Exhibit A to our appendix of
10:56:47 10 evidence.

11 THE COURT: All right. That will show up. Do you
12 all have that on your -- okay. Do you have that defense?
13 Miss Rice?

14 THE LAW CLERK: I'm sure I do.

10:57:01 15 MR. REID: This is the master services agreement
16 entered into between my client Smash Technology and FeraCode
17 for purposes of developing the CRM Platform edition.

18 THE COURT: Okay.

19 MR. REID: If you go to the next callout you see
10:57:19 20 that the signatories are Wladimir Ribeiro, Junior, the CEO of
21 Farracode; and Michael Alexander on behalf of Smash
22 Technology. And it's dated March of 2018.

23 THE COURT: Now, let me make sure I've got my dates
24 right. According to the defense 10 months later, FeraCode
10:57:40 25 terminated this agreement because of nonpayment and also

1 because there was no transfer; right?

2 MR. REID: Yes. According to them conveniently
3 that appeared for the first time after we filed our complaint
4 in this matter in January 2019.

10:57:57 5 THE COURT: Okay.

6 MR. REID: Okay. So if you go to the next
7 pertinent page this is the work order form for the master
8 services agreement.

9 THE COURT: Right.

10:58:10 10 MR. REID: And you will see that the project
11 representatives for FeraCode is its CEO and for the client
12 interestingly it's Jerry Ulrich on behalf of Smash Technology,
13 the new partnership enterprise.

14 THE COURT: Okay. I see client Jerry Ulrich, but
10:58:33 15 if I go down a bit I'll see Smash Technology; right?

16 MR. REID: Correct; because he's representing the
17 client, which is Smash Technology.

18 If you go down to the next callout you will see
19 that as we've alleged that the project was divided into
10:58:52 20 12 milestones with payments that would accompany each
21 milestone, \$1.7 million. And FeraCode will only start a
22 milestone after Smash Technology executives have approved
23 previous milestones and paid the invoices.

24 THE COURT: So what you're saying is that Smash
10:59:13 25 Technology signed on on behalf of -- Mr. Ulrich signed on on

1 behalf of Splash Technology with FeraCode to develop the new
2 software.

3 MR. REID: Yes. Mr. Ulrich and my client as a
4 partnership in the new enterprise, Smash Technology, have now
10:59:39 5 entered into a contract with FeraCode, the coding provider, to
6 help continue to develop the intellectual property asset, the
7 software at issue in this case.

8 So what's interesting, you'll take a look, I've
9 highlighted it in red there.

10:59:58 10 THE COURT: Sure.

11 MR. REID: This is just a provision that says:
12 Should FeraCode conclude that it cannot perform this project,
13 FeraCode will draw out a written statement that it cannot
14 continue and deliver all works to Smash Technology.

11:00:13 15 This is one of the reasons we've added FeraCode
16 among many as a defendant in this case because they breached
17 this provision. They have not returned the software, whatever
18 state it's in, back to us. They haven't returned it back to
19 us as they're required to do.

11:00:29 20 If you'll go to the next callout, right here at the
21 bottom. FeraCode will deliver source code to my client, Smash
22 Technology, after completion of all 12 milestones.

23 So the Court might ask the question, why in the
24 world is FeraCode and Smash Technology entering into this
11:00:52 25 agreement to develop the source code if that source code, if

1 that infant intellectual property has not been transferred to
2 FeraCode for the benefit of my client? Because that's what
3 actually happened, and I'm going to walk you through that now.

4 If you go to the next document, which is Exhibit B
11:01:14 5 to our appendix of evidence.

6 THE COURT: Is that 33?

7 MR. REID: Yep. So now we're going back in time
8 just a little bit. This is at the start of this earnest
9 partnership between my client and Mr. Ulrich. Jerry Ulrich
11:01:30 10 sends this e-mail in November 2017. And if you, just calling
11 out a few things, the Court can review this carefully and I'm
12 sure it has. He says to my client:

13 I needed to do some soul searching because I know
14 with your business experience we can bring this home.

11:01:49 15 However, it will require a huge commitment for both of us.
16 Hey, we're going to be billionaires.

17 That's his statement to my client. If you go down
18 to the next callout. Now he's talking about Smash
19 Technology's development of the software.

11:02:06 20 We would be nine months in development and the
21 software company is ready to go if we can supply the monthly
22 revenue requirement to keep them paid. As we saw, it's going
23 to cost \$1.7 million to do this. He says: That means in less
24 than two years we would be sitting on a billion dollar
11:02:25 25 company. I know we have had a million challenges, and I know

1 any of those mistakes are my own, and I take complete
2 accountability for all them. I know with your business
3 experience and connections combined with the plan that we have
4 developed we can accomplish this extraordinary ambitious
11:02:41 5 software.

6 That's what they set out to do. You'll see at the
7 bottom here, again reiterating their partnership.

8 I am willing to work into a full partnership with
9 you meaning you would own, I believe he meant to say, the same
11:02:57 10 equity as I own.

11 And that's how they proceeded down the path.

12 THE COURT: "The same equity as I own" in what?

13 MR. REID: It's Smash Technology.

14 THE COURT: Okay.

11:03:06 15 MR. REID: This is the new company, the new
16 enterprise, the new partnership that they're going to be part
17 of.

18 THE COURT: All right. And when it says: We need
19 to clean up the shares and the company infrastructure, we're
11:03:17 20 talking about Smash Technology's interest.

21 MR. REID: He's talking about the old entity. The
22 old entity. We're going to take that infant technology out of
23 the old entity. It's got lots of problems, and we're going to
24 bring it over to our new partnership, our new entity.

11:03:35 25 THE COURT: The old company?

1 MR. REID: Yeah. The old Smash Solutions, the
2 defendant. One of the defendants.

3 THE COURT: But doesn't that then tie into the
4 defendant's argument that any transfer -- the old company
11:03:46 5 would include the old company's trademark, wouldn't it?

6 MR. REID: No. We don't want the trademark. We
7 don't care about the trademark. That's just a legal argument.
8 That's not what happened. That's not even our allegations.

9 THE COURT: Okay.

11:03:59 10 MR. REID: This isn't a trademark case, Your Honor.
11 We don't care about it. It's not even mentioned one time in
12 our complaint.

13 So if you go to the next part of this long e-mail,
14 Mr. Ulrich again, these again are, Your Honor, documentary
11:04:20 15 admissions from the defendant.

16 You and I combined can find the funding. I know
17 this product market and have a belief deeper than anything
18 I've ever believed in or been involved in.

19 If you go to the next callout.

11:04:33 20 THE COURT: What about the argument, we're not
21 denying that there were plans, but the plans never came to
22 fruition. And because they never came to fruition we never
23 transferred our infant software. And the development that was
24 done was of our basic idea, and we own it. We own the basic
11:05:07 25 idea and what has become of it. You might have a complaint

1 for a claim against Solutions because we didn't do it, but as
2 far as transferring the software never happened?

3 MR. REID: That's the right question, Your Honor.
4 And the response is we put forward evidence to dispute that
11:05:27 5 fact. And what I'm going to do is I'm going to walk you on
6 this journey that my client and defendant took together.
7 That's what I'm doing here.

8 THE COURT: Okay. What I see here and I don't
9 think there was a dispute from the defense that it was
11:05:42 10 contemplated.

11 MR. REID: Okay. And what you're going to see as I
12 move through the documents --

13 THE COURT: Okay.

14 MR. REID: -- is that not only was it contemplated,
11:05:50 15 but it actually happened.

16 THE COURT: That's the key.

17 MR. REID: That's the key. Did it happen? Did it
18 happen? And we're going to walk through the documents to show
19 that it did.

11:06:00 20 If you go to Exhibit F, this is a wire transfer
21 receipt for 60,000 US dollars. It's from my client to
22 Mr. Ulrich sent on February 2018, about a month before
23 FeraCode and Smash Technology entered into their agreement.
24 You'll see on the next page that this wire was sent from a
11:06:36 25 Jakarta, Indonesia, bank account. My client spent some of his

1 time in nearby Bali. You'll see it was sent to a America
2 First Credit Union account, which the documents have shown we
3 believe belongs to Mr. Ulrich. So you have this evidence of a
4 realtime wire transfer from my client for \$60,000. Now let's
11:06:58 5 trace this through because it is critical.

6 THE COURT: Clarify this for me. I don't think
7 there's any dispute that money was wired and that it was in
8 contemplation of the development of the software.

9 MR. REID: Right.

11:07:17 10 THE COURT: However, what does that show other than
11 performance by Mr. Alexander and a possible breach by Smash
12 Solutions or Mr. Ulrich? And they say, okay, you thought we
13 were going ahead. You put up the money. You performed.
14 Guess what, we didn't.

11:07:41 15 MR. REID: You're asking the right questions again,
16 Your Honor.

17 THE COURT: I so often do.

18 MR. REID: And the answer is, where did the money
19 go? What happened? Did it -- again, did it materialize? And
11:07:54 20 so again, let's work our way through these documents here,
21 because this is critical. That's why I'm sharing it with you.
22 This is right here what precludes summary judgment. If you go
23 to the next Exhibit G, which is again in the appendix of
24 evidence, you will see that this is an e-mail from Mr. Ulrich
11:08:12 25 a few weeks later in February 2018 to my client. And you will

1 see he starts talking about:

2 Once I have the documentation we have the funding
3 to submit the \$10,000 to him and be underway in activating the
4 new corporation.

11:08:29 5 THE COURT: Who's Sterling? The corporate
6 attorney?

7 MR. REID: Sterling Kerr is the attorney that did
8 work in forming the Smash Technology entity. And my client's
9 declaration states that that \$10,000 was another part of his
11:08:45 10 investment into Smash Technology. He paid Mr. Kerr that
11 money.

12 So then if you continue to Exhibit H. This is an
13 e-mail. Subject titled Smash Technology Contract. It's from
14 Mr. Ulrich, defendant, to my client and Mr. Kerr. Here's the
11:09:13 15 agreement from FeraCode. I'm working on price with them for
16 the first two months.

17 So he sends them the agreement. He's right in the
18 middle of this transaction. You go to the next exhibit, which
19 is Exhibit I. Again, a couple weeks later, subject line, made
11:09:31 20 corrections. Mr. Ulrich says to my client: Michael, here's
21 the agreement. Please sign and return and let me know how we
22 move forward with budget and check to these guys.

23 In other words, hey, you tell me how we're going to
24 pay these guys because we're going to actually do this. Not
11:09:50 25 just contemplate it, but do it. Okay.

1 So then we go to Exhibit K all right in our
2 appendix. Here's my client's response on the same date of
3 that e-mail: JJ, I signed the contract and have attached.
4 Second paragraph.

11:10:10 5 THE COURT: And again, you're talking about the
6 FeraCode contract.

7 MR. REID: Absolutely. I hereby authorize per our
8 verbal agreement you have my permission to use \$50,000 I wired
9 to you to buy BitCoin for me to pay this first payment to the
11:10:28 10 development team together with the our shared funds from
11 Uberfund to cover the \$76,000 first installment.

12 THE COURT: When he says: I hereby authorize per
13 our verbal agreement. Is he speaking about the agreement to
14 develop the software for the benefit of technology?

11:10:49 15 MR. REID: Exactly.

16 THE COURT: Okay.

17 MR. REID: So then he even says: Hey, call me when
18 you're up. We'll put our heads together on how we cover the
19 next payment.

11:10:59 20 So we're going to pay these guys again to develop
21 Smash Technology's software. So then, and this e-mail alone,
22 Your Honor, it precludes summary judgment among the many
23 other. And I'm not going to walk through all of the
24 documents, but this one right here. The next e-mail from
11:11:19 25 Mr. Ulrich, to my client, he says:

1 This is to show a receipt of transfer from Uberfund
2 to PaidEasy. When we paid the invoice to FeraCode \$50,000 was
3 used from the \$60,000 you sent. The difference was used by
4 pulling all cash and commissions out of our accounts to cover
11:11:43 5 the \$26,000 difference.

6 And what he's referring to there is their shared
7 BitCoin account. So in other words, my client paid almost the
8 entirety of the first \$76,000 development payment to FeraCode.
9 And there's more.

11:12:00 10 THE COURT: When "we" paid. Who paid? Who's the
11 "we?"

12 MR. REID: Him. Him and my client Mr. Ulrich and
13 Mr. Alexander. We did it, because we have a partnership in
14 Smash Technology.

11:12:16 15 THE COURT: Okay.

16 MR. REID: So now if you take a look at Exhibit 4
17 of the appendix, these are a series of invoices that were sent
18 from FeraCode to Smash Technology for the development of the
19 software at issue in this case.

11:12:35 20 THE COURT: Right.

21 MR. REID: And if you'll notice at the top
22 right-hand corner this one says paid. And if you'll notice,
23 as well, it's for the \$76,000 that you just referenced. So
24 this is evidence, not a contemplation. This is evidence of
11:12:52 25 performance. We did this together, and this is my client's

1 money.

2 Now, what you'll also notice in these invoices is
3 Invoice 2, 3, 4, 5 were all paid by Smash Technology, all the
4 way through the end of 2018. And then what you'll find is,
11:13:15 5 yes, some straggling invoices towards the end of the year were
6 not paid, and that's because the parties dispute crystallized.
7 And we ended up having to file a complaint in January to
8 demonstrate that we own this property among other allegations
9 that we made.

11:13:36 10 Now what's interesting and conveniently, it was
11 only then, Your Honor, that for the first time this idea that
12 there was some notice of termination by FeraCode, that came
13 after we filed our complaint.

14 THE COURT: Well, are you saying that FeraCode did
11:13:55 15 not terminate?

16 MR. REID: Yeah. We dispute that they terminated.
17 In my client's declaration, he says, I never got that. But
18 even if they did terminate, it was 10 months into my client
19 and Smash Technology systemically paid for the development of
11:14:13 20 the property at issue in this case. How can -- how can this
21 case not move forward past summary judgment with those facts
22 in the record? There's clearly a dispute as to who owns this
23 software. That's what trials are for, to figure it out.

24 THE COURT: What about, is the only evidence of
11:14:36 25 termination by FeraCode Mr. Ulrich's declaration?

1 MR. REID: Correct.

2 THE COURT: There is nothing independent such as a
3 document from FeraCode or --

11:14:50

4 MR. REID: There is a document from FeraCode that
5 my clients had never seen and was only produced to us months
6 later after January during the course of this dispute. So
7 there is a document. And it has the issues that come with it.

11:15:09

8 THE COURT: So it is a document from FeraCode
9 saying, you haven't paid. You don't have the software.
10 You're out of here.

11 MR. REID: That's right.

12 THE COURT: Okay.

11:15:18

13 MR. REID: So then, of course, we argue that's one
14 piece among many things. That's certainly not determinative
15 of our rights and what we paid for.

16 THE COURT: Right.

11:15:40

17 MR. REID: Finally -- well, yeah, let's throw it
18 out. Exhibit 5. This is Sam Potter. He's mentioned in the
19 allegations. He's a buddy of JJ Ulrich's. And he was hired
20 and engaged by Smash Technology to sort of be their point
21 person with FeraCode. Hey, we need a guy with some expertise
22 to sort of help monitor their development of Smash Technology
23 software.

11:15:57

24 And what I've provided to the Court is a series of
25 documents demonstrating that Smash Technology paid Mr. Potter

1 the entire length of 2018 from April all the way to November.
2 We paid for his services because we were developing the code.
3 And he accepted our money. And where did that money come
4 from? My client states that it came from his coffers. It
11:16:18 5 came from his resources.

6 And here's the strange procedural posture we are
7 in, Your Honor, is this summary judgment motion was filed so
8 early in the case we don't even have the benefit of all
9 defendant's documents. We had to submit our record evidence
11:16:36 10 without any discovery. We haven't deposed anyone yet. And so
11 not withstanding that premature nature of their motion the
12 record evidence demonstrates a substantial and significant
13 genuine dispute of fact.

14 So this case needs to move forward. And when we
11:16:57 15 come back here down the road you can bet there's going to be a
16 whole host of other documents. We don't even have any of
17 Mr. Ulrich's financial records. All of the payments that my
18 client made to him, all of the BitCoin that he pulled out of
19 my client's accounts to help fund this development, we haven't
11:17:16 20 seen any of those records yet. And when we get them, it's
21 going to create a very compelling story that they moved well
22 beyond contemplation, and they proceeded down this path and
23 they developed this software. And that bundle of right in
24 that software, not a trademark, we don't care. That bundle of
11:17:37 25 right is what this case is about.

1 And so I would submit that evidence I just walked
2 you through compared to one single statement from Mr. Ulrich
3 that Solutions owns the property, that's the stuff that
4 summary judgment denials are made of.

11:17:56 5 Now, I think it's important to talk about this idea
6 that intellectual property and specifically the question of
7 ownership, the case law, and we've cited cases for you, it is
8 a question of fact. And that's why at the summary judgment
9 stage, you know, we cited the Luckette case stating that which
11:18:28 10 party owned the intellectual property was a material question
11 of fact precluding summary judgment. We cited the Bodum USA
12 case* that says: Whether intellectual property were validly
13 assigned was a question of fact that precluded summary
14 judgment. And that's because this registered trademark
11:18:48 15 concept from the Lanham Act has literally zero application to
16 this case.

17 And so in short, Your Honor, if the Court has any
18 additional questions, but I think that our evidence is
19 compelling. I think my client deserves to have his
11:19:04 20 opportunity to proceed with discovery in this case and to
21 truly vindicate his rights, especially when he according to
22 him has spent \$2 million developing this software.

23 THE COURT: When he and it. You represent both
24 Mr. Alexander and Smash Technology?

11:19:21 25 MR. REID: That's right. That's right.

1 THE COURT: Okay.

2 MR. REID: Thank you, Your Honor.

3 THE COURT: Let's take about a 10-minute break, and
4 then I'll certainly hear from you defense.

11:19:28 5 MR. BARNECK: Thank you.

6 (Recess.)

7 THE COURT: Okay. Go ahead, please, defense.

8 MR. BARNECK: Thank you, Your Honor. I'd like to
9 begin by refocusing us on I think a key point, which is that
11:33:34 10 it's undisputed that Solutions owned this intellectual
11 property in the beginning, and we say they still own it. And
12 the question --

13 THE COURT: What was that second thing you say?

14 MR. BARNECK: We say they still own it.

11:33:47 15 THE COURT: Okay.

16 MR. BARNECK: And the question is whether it's been
17 transferred. But counsel said something to the effect that
18 all this hinges on one little statement in Mr. Ulrich's
19 declaration. Well, it happens to be a statement that they
11:34:00 20 agree with. Their pleadings, both their original complaint
21 and their amended complaint refer to it as Solutions'
22 intellectual property.

23 THE COURT: Well, it's not anymore.

24 MR. BARNECK: They say it's been transferred. But
11:34:16 25 I'm saying the starting point is an undisputed point.

1 Everyone agrees that this began as intellectual property owned
2 by Smash Solutions. And the question for the Court is, has it
3 transferred?

4 THE COURT: Right.

11:34:32 5 MR. BARNECK: We say no; they say yes.

6 THE COURT: Yes.

7 MR. BARNECK: So I want to refocus that because I
8 think they tried to minimize the fact that that's undisputed.
9 It's even alleged in their pleadings.

11:34:42 10 THE COURT: That at the beginning of the process
11 nobody disputes that it was initially the property of
12 Solutions.

13 MR. BARNECK: That's correct.

14 THE COURT: Okay.

11:34:57 15 MR. BARNECK: That's correct. So then the question
16 is whether it's been transferred.

17 THE COURT: Yep.

18 MR. BARNECK: And, of course, we cited the writing
19 requirement that we think is critical here.

11:35:13 20 THE COURT: But according to plaintiff they don't
21 care what you do with your trademark. They just want the
22 property because they wanted Smash Solutions and everything
23 that goes with it to be dissolved.

24 MR. BARNECK: They say that, but it doesn't make
11:35:34 25 sense --

1 THE COURT: Okay.

2 MR. BARNECK: -- Your Honor, for a couple of
3 reasons.

4 THE COURT: Okay.

11:35:38 5 MR. BARNECK: One is that they allege trademark
6 claims in this case. They allege Lanham Act claims. They
7 allege three of them and two causes of action. And each of
8 those claims requires proof of ownership of the trademark to
9 pursue it. We cited case law to say that. And I'd be happy
11:36:00 10 to walk through it.

11 THE COURT: No. You need not.

12 MR. BARNECK: But that's something that they gloss
13 over. Their Sixth and Seventh causes of action in the new
14 complaint that the Court just approved allege false
11:36:13 15 advertising and false designation of origin and unfair
16 competition all under 15 USC Section 1125.

17 THE COURT: But they say what it is is they own the
18 intellectual property. And if there's a violation of a mark,
19 although I don't think they say they've allege it, it's that
11:36:40 20 Ulrich and --

21 MR. BARNECK: Alexander.

22 THE COURT: -- Solutions, you're breaching it.
23 You're breaching their new ownership, but you're not breaching
24 Solutions' trademark. They say they don't care about
11:37:00 25 Solutions' trademark.

1 MR. BARNECK: Well, that's the other reason why
2 their position doesn't make sense because they say, we own all
3 of it. And all of it would include the trademark right.

4 THE COURT: Okay.

11:37:14 5 MR. BARNECK: And that's why we started looking at
6 this writing requirement in the first place because they're
7 alleging these Lanham Act claims, and we find the statute in
8 the case law that says you've got to have a written instrument
9 duly executed to transfer a mark, even if it's just a mark,
11:37:36 10 but certainly if it's the mark as part of the overall bundle
11 of rights that complete ownership would convey. They still
12 have to comply with that writing requirement. And so to say,
13 we don't -- I wrote down some quotes. We have no interest in
14 a trademark. We don't care about it. It's not even mentioned
11:37:56 15 one time in our complaint. Well, it is by way of allegation
16 of Lanham Act claims.

17 And so our point to the Court is, if you're
18 pursuing Lanham Act claims you're bound by the writing
19 requirement. That's what the case law says. We've cited each
11:38:16 20 one of for each one of those three claims. It says you've got
21 to prove ownership of the mark or right in the mark, and we
22 cited that in our briefing.

23 So the question then still comes back to whether it
24 was transferred. They just want to say, oh, we own it. But
11:38:35 25 they don't say how that ownership transferred. I looked at

1 all of these exhibits that counsel showed the Court, and they
2 talk about funding. That's a wire transfer from Indonesia.
3 There's e-mails talking about \$10,000 to Mr. Kerr.

4 THE COURT: But there are also documents that
11:39:00 5 exhibit I think they've argued that Mr. Ulrich and
6 Mr. Alexander were working together to get the software
7 developed.

8 MR. BARNECK: We do not dispute that. As we said
9 at the beginning, there were discussions and there were steps
11:39:19 10 taken on both sides to work toward that end. It just didn't
11 get completed. Neither did the funding get completed on his
12 side, certainly the transfer of ownership didn't get completed
13 on our side. If they have a claim for breach of contract
14 based on that or a claim to an ownership interest in Solutions
11:39:40 15 because of the funding, those are issues for another day. We
16 do not concede. We simply say they are distinct from the
17 question of ownership.

18 THE COURT: Okay.

19 MR. BARNECK: And I think it's important to -- I
11:39:57 20 just lost my train of thought. But let me point out a couple
21 of other things. One is you asked about whether there is a
22 document reflecting the FeraCode termination, and there is and
23 we attached it to our motion.

24 THE COURT: Right. And I've looked at that.

11:40:20 25 MR. BARNECK: You looked at that.

1 THE COURT: Yes.

2 MR. BARNECK: 32-6 is the document number for the
3 record. And it says: The reasons are the seriousness
4 delinquency of the payments and final transfer of the
11:40:32 5 intellectual property not being completed from Jerry Ulrich
6 and Smash Solutions gave us no other option but to exit and
7 terminate this agreement effective immediately.

8 So I think the question mainly hinges I think first
9 on whether there is a writing, a written instrument duly
11:40:56 10 executed. I think the Court needs to decide, does that
11 writing requirement apply here? We think it does, because
12 whether they care about the trademark or not, what they wanted
13 is a bundle of rights that included the trademark.

14 And it's also important to remember that these
11:41:15 15 parties were contemplating a written document that would have
16 effected the transfer. And it never got finalized by
17 Mr. Alexander's own admission. And if the Court determines
18 that the writing requirement doesn't apply then I think what
19 the Court has to look at is are claims about funding, claims
11:41:39 20 about wanting to form a partnership or joint business venture,
21 whatever you call it, does that evidence by itself reflect a
22 transfer of ownership? I think that's the second question if
23 you decide that the writing requirement doesn't apply.
24 Honestly I think it's hard to get around that because you've
11:42:02 25 got a federal statute and case law that seems undisputed, and

1 the plaintiffs frankly have not even tried to dispute that
2 principle of law.

3 Also here's the point I forgot just a moment ago.
4 The verbal agreement that they allege which is laid out in
11:42:28 5 their complaint, for the record I'll just say that it's in
6 Paragraphs 12 and 13 of the amended complaint, does not
7 include Solutions, it is by their own allegations a verbal
8 agreement only between Alexander and Ulrich. And in our
9 separate briefing on the motion to dismiss, we had some
11:42:59 10 argument about that, and they said quite emphatically
11 Solutions is not a party to this agreement. It's only
12 Alexander; it's only Ulrich. And that's why their breach of
13 contract claim is only alleged against Ulrich.

14 But the parties agree that Ulrich didn't own this
11:43:18 15 software. They don't have, even by -- if we take their
16 allegations at face value, they don't have an agreement that
17 involves Solutions and would require Solutions to transfer
18 ownership of the intellectual property.

19 I guess the last thing I'll say is that counsel has
11:43:36 20 said that they ought to have the right to conduct discovery on
21 these issues. And we don't dispute that they ought to have
22 the right to conduct discovery on all of the other issues that
23 they've addressed. They just haven't addressed the ownership.
24 There's been plenty of opportunity for them to come up with a
11:43:57 25 document that shows there was a transfer of ownership. We've

1 asked for it. It hasn't been produced. We've asserted it in
2 our motion, and it doesn't exist. And they have not produced
3 one in response. I don't know what further discovery could
4 help with with regard to a written instrument. But certainly
11:44:16 5 with regard to all the other issues in the case that we are
6 not seeking adjudication of here, the parties are going to
7 have whatever discovery the Court deems is appropriate.

8 THE COURT: Thank you, counsel.

9 MR. BARNECK: Thank you.

11:44:28 10 THE COURT: Here's what -- I've already granted the
11 motion to amend. But again in listening to your arguments
12 which clarified issues that weren't as clear to me after
13 reading the materials as they are now I'm still firm in my
14 belief that there are disputed issues of fact about who owns
11:44:57 15 what. And for that reason I'm going to deny the motion for
16 partial summary judgment with prejudice.

17 We'll be in recess.

18 (Whereupon, the court proceedings were concluded.)

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1 STATE OF UTAH)

2) ss.

3 COUNTY OF SALT LAKE)

4 I, KELLY BROWN HICKEN, do hereby certify that I am
5 a certified court reporter for the State of Utah;

6 That as such reporter, I attended the hearing of
7 the foregoing matter on August 14, 2019, and thereat reported
8 in Stenotype all of the testimony and proceedings had, and
9 caused said notes to be transcribed into typewriting; and the
10 foregoing pages number from 3 through 57 constitute a full,
11 true and correct report of the same.

12 That I am not of kin to any of the parties and have
13 no interest in the outcome of the matter;

14 And hereby set my hand and seal, this ____ day of
15 _____ 2019.

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KELLY BROWN HICKEN, CSR, RPR, RMR

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